Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1801

THE STATE OF NORTH CAROLINA,

Petitioner,

—against—

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN MATHIESON CHEMICAL CORPORATION and THE UPJOHN COMPANY,

Respondents.

JOINT BRIEF FOR RESPONDENTS BRISTOL, SQUIBB AND UPJOHN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 14, 1976

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Respondents Bristol-Myers Company ("Bristol"), Olin Mathieson Chemical Corporation ("Squibb") and The Upjohn Company ("Upjohn") submit this joint brief in opposition to the petition because of the six alleged questions presented, (a) three have nothing to do with Bristol, Squibb and Upjohn (Questions A, B and C, Pet. 3-8) and (b) the other three raise no points of law which warrant review by this Court (Questions D, E and F, Pet. 8-13).

Opinions Below and Jurisdiction

The opinions below affecting these three respondents and the basis of this Court's jurisdiction are set forth in the petition and appendices thereto (Pet. 2-3; App. A, A-1-33; App. C, 351a-908a).*

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* App. refers to the appendices to the petition for certiorari; for the convenience of the Court, references to pages of these appendices will be in the same form used by petitioner.

Questions Presented as to Bristol, Squibb and Upjohn

The three alleged questions presented as to Bristol, Squibb and Upjohn (Questions D, E and F, Pet. 8-13), which do not warrant review by this Court, are discussed below.

Statement

This is an antitrust conspiracy case filed in 1969. After several years of extensive pretrial proceedings, it was tried to the District Court sitting without a jury.

The record consists of more than 11,000 pages of transcript and 1,900 documentary exhibits. Trial to the District Court lasted some forty-eight trial days. Petitioner submitted 850 pages of post-trial brief, appendices and proposed findings of fact to the trial court and, to the Court of Appeals, a 163-page brief. The joint appendix in the Court of Appeals consisted of fifty-three volumes.

The District Court "reviewed and considered all of the testimony and documentary evidence offered by the plaintiff," was "careful to consider all the plaintiff's evidence collectively" and found such evidence to be "conflicting and of insufficient force to carry plaintiff's burden of persuasion" (App. C, 380a, n.11, 416a).

The Court of Appeals stated that:

> "North Carolina's appeal presents two issues: (1) Whether the district court erred as a matter of law when it denied the plaintiff's motion for partial summary judgment on the basis of collateral estoppel that

> Pfizer and Cyanamid had caused the Conover patent to be issued by defrauding the United States Patent Office; and (2) whether the district court's findings of fact were clearly erroneous." (App. A, A-5)

Bristol, Squibb and Upjohn were not involved in the first question. Thus the only issue as to those three respondents was "whether the district court's findings of fact were clearly erroneous"—an issue resolved squarely against petitioner by the Court of Appeals. Petitioner's three alleged questions (D, E and F), although variously phrased, simply reassert petitioner's twice-rejected view of the facts.

ARGUMENT

I

This Court's So-Called "Two-Court Rule" Requires Denial of the Petition as to Bristol, Squibb and Upjohn.

Petitioner is asking this Court to make an independent review of the facts as to Bristol, Squibb and Upjohn. Both decisions below turn on issues of fact decided against petitioner by the District Court and held not clearly erroneous by the Court of Appeals.

This Court has held that "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-36 (1967); see

also *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401, n.2 (1975) (where this Court referred to the *"heavy burden* under the 'two-court rule' [citing *Graver Mfg. Co.* v. *Linde Co.* and *Berenyi* v. *Immigration Director, supra*]") (emphasis added).

It is respectfully submitted that, as to *each* of the three "questions presented" as to Bristol, Squibb and Upjohn, the "two-court rule" bars certiorari review. Specifically, the first question for which petitioner seeks such review is as follows:

> "Upon Such Undisputed Facts and Evidence, Do Applicable Principles of Antitrust Law Clearly Stated by This Court in Reported Cases [footnote citations omitted] Require Resolution of Such Facts as the *Purposes of,* and *Operating Practices* Under Such Settlements, Patent Interchange and License Agreements, and the Effect *Thereof on Prices*?" (Question D, Pet. 11)

In other words, petitioner contends the courts below had a duty to find the facts with respect to the purposes and effects of the challenged conduct—a proposition with which we of course agree. The answer is that the District Court did find the facts with respect to those issues* and the Court of Appeals affirmed. Hence certiorari review is now inappropriate.

Similarly, the second question for which petitioner seeks certiorari review is as follows:

> "In an Antitrust Case Acknowledged to be of 'Great Public Importance', Is Application of the Proper Standard of Law to the Factual and Legal Nature of the Terms *'Agreement'* and *'Understanding'*, and the Nature of Proof, Thereof, Required?" (Question E, Pet. 12)

* Relevant findings include those appearing in Appendix C at 431a-36a, 467a-72a, 607a-13a, 629a-757a.

In this question, petitioner contends that the courts below had a duty to apply proper legal standards to the facts—and again we agree. There is nothing in the opinions below to suggest that the District Court and the Court of Appeals failed to apply "the proper standard of law" to the entire record. On the contrary, every case cited to this Court by petitioner on both Questions D and E (Pet. 11n. and 42-46) was cited to one or both of the courts below and the applicability of those cases to the record was resolved against petitioner by both courts. The fact remains that the dispute below was entirely factual, not legal, and in both courts petitioner lost. The two-court rule is thus clearly applicable.

Finally, petitioner seeks certiorari review of the following issue:

> "Should Such Findings Be Vacated and Set Aside and Essential Proper Findings Necessary to Support the Judgment of the District Court be Required?" (Question F, Pet. 13)

Petitioner contends here, as it did in the Court of Appeals (App. H, H-5), that the findings made by the District Court were improper, but that suggestion has been rejected by both of the courts below. Certiorari review to consider the same question once more would be clearly inappropriate.

Although it is not necessary for the application of the two-court rule, we submit that the findings of the District

Court as affirmed by the Court of Appeals are clearly correct. After an exhaustive trial on the merits, the District Court issued its thorough and soundly reasoned opinion, being "careful to consider all the plaintiff's evidence collectively with due regard to the Supreme Court's admonition that the antitrust plaintiff should be given the full benefit of his proof 'without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.' *Continental Ore Company* v. *Union Carbide & Carbon Corporation,* 370 U.S. 690, 699 (1962)" (App. C, 380a-81a).

Petitioner's attempt to obtain a trial *de novo* on appeal was rejected. On all issues presented as to Bristol, Squibb and Upjohn, petitioner is making its second such attempt here.

This Court has repeatedly given short shrift to attempts by parties unsuccessful below to obtain trials *de novo*:

> "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. There is no exception which permits it, even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design. While, of course, it would be our duty to correct clear error, even in findings of fact . . . a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'" *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 341-42 (1949).

See also, *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 596-97 (1951); *United States* v. *Oregon State Medical Soc.,* 343 U.S. 326, 331-32 (1952).

In addition, the "concurrent findings of fact by two courts below" (*Graver Mfg. Co.* v. *Linde Co., supra*) are not only correct on the record in this case but also are entirely consistent with the results of prior proceedings involving identical charges against these three respondents. This Court and courts below have seen tetracycline litigation before and Bristol, Squibb and Upjohn have emerged victorious in every instance of final adjudication on the merits.

In July 1958 the Federal Trade Commission commenced an action against all five respondents. All charges against Bristol, Squibb and Upjohn were eventually dismissed in that lengthy action.*

In August 1961, a criminal indictment was returned in the Southern District of New York against Bristol, Cyanamid and Pfizer.** This Court in 1972 affirmed the decision of the Court of Appeals for the Second Circuit reversing a conviction and ordering a new trial. *United States* v. *Chas. Pfizer & Co., et al.,* 426 F.2d 32 (2d Cir. 1970), *reh. en banc denied,* 437 F.2d 957, *aff'd mem.,* 404 U.S. 548 (1972). All three defendants were acquitted on retrial in 1973. *United States* v. *Chas. Pfizer & Co., Inc.,* 367 F. Supp. 91 (S.D.N.Y. 1973).

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* *American Cyanamid Co., et al.,* F.T.C. Docket No. 7211 (Hearing Examiner's Opinion, October 31, 1961), summarized in [1961-63 Transfer Binder] Trade Reg. Rep. ¶ 15,537 (FTC 1961), 63 F.T.C. 1747 (1963) *vacated, American Cyanamid Co.* v. *F.T.C.,* 363 F.2d 757 (6th Cir. 1966), 72 F.T.C. 623 (1967), *aff'd sub nom. Chas. Pfizer & Co., Inc.* v. *F.T.C.,* 401 F.2d 574 (6th Cir. 1968), *cert. denied,* 394 U.S. 920 (1968).

** Squibb and Upjohn were named as co-conspirators but not as defendants in the indictment.

The significance of these victories is underscored by petitioner's concession that "the writings," "[t]he persons engaged in, and the times and places of each communication relied upon by plaintiff, are the same as those referred to in the criminal charges and the FTC case" (Petitioner's April 15, 1975 Brief to the Court of Appeals, at 5).

II

None of the Reasons Urged for Granting the Petition as to Bristol, Squibb and Upjohn Satisfies the Requirements of Rule 19 of This Court and None Warrants Granting the Petition.

Rule 19 of this Court sets forth "Considerations Governing Review on Certiorari." Petitioner makes no reference, either general or specific, to Rule 19 or any of its provisions in its discussion of the three issues presented as to Bristol, Squibb and Upjohn. Not one of the grounds set forth in the Rule is applicable in this case to those parties.

CONCLUSION

No questions of law or considerations of public interest make review by this Court appropriate in this case. Moreover, the concurrent findings by two courts below were correct and, as to Bristol, Squibb and Upjohn, no questions of law which require review are presented. Accordingly, the petition should be denied.

Respectfully submitted,

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